No. 92-1521

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In The

Supreme Court of the United States

October Term, 1992

M/V PINE FOREST, *et al.*,

Cross-Petitioners,

vs.

NELSON R. RABY, *et al.*,

Cross-Respondents.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a district court have "inherent authority" to award attorneys' fees to plaintiffs in an action under 46 U.S.C. §10313, the Seaman's Wage Act, even though the Act does not grant a right to such fees and does provide penalties for bad faith failure to pay wages due?

2. Should *Vaughan v. Atkinson* be extended to give a district court authority to award attorneys' fees for an alleged "bad faith" failure to pay wages due a seaman under a contract which does not provide for such fees?

3. Does a district court have inherent power to punish substantive prelitigation conduct by awarding attorneys' fees?

4. If attorneys' fees were properly awardable in this case, should the court of appeals nevertheless have reversed and remanded to recalculate the fee award, since plaintiffs' final recovery was only a small fraction of the amount claimed, plaintiffs only prevailed on one of the several claims which they pursued in the case, and the fees awarded were substantially higher than the amount recovered?

LIST OF ALL PARTIES TO THE PROCEEDING

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners M/V Pine Forest, Delica Shipping, S.A., and Inui Steamship Co., Ltd. respectfully pray that a writ of certiorari issue to review the award of attorneys' fees upheld in the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 14, 1992.

OPINIONS BELOW

The references to the opinions below are set forth in the plaintiffs' petition for writ of certiorari.

STATEMENT OF JURISDICTION

This cross-petition for writ of certiorari is filed under Rule 13.1 and is designated as a cross-petition only to avoid confusion, since a petition for writ of certiorari has already been filed by the plaintiffs in this action. This Court has jurisdiction to grant this cross-petition even if it does not grant review of plaintiffs' petition. The judgment sought to be reviewed was entered by the United States Court of Appeals for the Ninth Circuit on October 14, 1992. Rehearing was denied on December 9, 1992. Plaintiffs' petition was filed on February 8, 1993. Jurisdiction to review the judgment in question is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Seaman's Wage Act provides in part:

* * *

> (e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take

action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by the subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313 in its entirety is pertinent to this cross-petition and it is set forth in the Appendix to plaintiffs' petition for writ of certiorari (hereafter Pet. App.) at A54.

STATEMENT OF THE CASE

A. Proceedings Below

This was an action brought in the names of twenty-one Filipino crew members of the M/V PINE FOREST, a foreign-flagged, foreign-operated and foreign-owned vessel. Jurisdiction was obtained over the vessel when it stopped in Tacoma, Washington, to pick up a cargo of logs for transport to Japan. The claimed basis for the district court's jurisdiction is set forth in the petition for certiorari.

Of the plaintiffs named in the complaint, thirteen signed it and were discharged in the United States. These have been referred to throughout this case as the "individual" or "Dodson" plaintiffs. The other seamen were either discharged in Japan before the complaint was filed or declined to sign it and sailed with the PINE FOREST after its owners posted a $19 million release bond required by the district court. The action on their behalf was brought without their consent by a Filipino union known as AMOSUP.

The initial complaint was filed on January 30, 1990, and sought back wages for eleven individual plaintiffs under 46 U.S.C. § 10313, in addition to statutory penalties and damages for fraud and intentional infliction of emotional distress. Defendants, the vessel, the shipowner, and the ship operator, tendered the back wages claimed on February 8, 1990, the day the individual plaintiffs left the vessel. But the tender was declined because an amended complaint adding additional plaintiffs was about to be filed. That complaint was attached to a motion to amend filed on February 13, 1990. On that date, defendants paid the thirteen individual plaintiffs $267,585, the amount they had demanded under § 10313. Defendants counterclaimed for return of this money and for the damages incurred in posting and maintaining an excessive release bond.

The case went to trial in May, 1990, on the fraud and intentional infliction of mental distress claims, on a blacklisting claim added after the PINE FOREST had been arrested, and on the back wages claimed by the AMOSUP plaintiffs. The trial court awarded the plaintiffs a total of $32,657,536 and accruing statutory penalties at roughly $900,000 per month. It also awarded attorneys' fees, "attorneys' disbursements" and costs. Of this amount, the individual plaintiffs were awarded $25,315,837 in additional back wages, statutory penalties, compensatory damages, and punitive damages, plus their proportionate share of the accruing penalties and costs. In addition, the court awarded them $410,043 in attorneys' fees and awarded $86,471 in "attorney disbursements" to Mr. Dodson, personally. The trial court ruled that, "Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson*, 369 U.S. 527 (1962)."

On appeal, the Ninth Circuit reversed the judgment for all plaintiffs in its entirety, with the exception that it upheld the attorneys' fees and perhaps the attorneys' disbursement awards to the individual, but not the AMOSUP plaintiffs. The decision was reported under the name of one of two other cases with which it had been coordinated. *Su v. Southern Aster*, 978 F.2d 462 (9th Cir. 1992). The Ninth Circuit ruled that although the individual plaintiffs had lost on every theory and claim propounded at trial, they were the prevailing parties because they had recovered the $267,585 as a result of their suit and they were entitled to that amount under § 10313. It stated in addition that:

> Ordinarily the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff "to go to court to get what was plainly owed him." [citing *Vaughan v. Atkinson*].

Id. at 475.

B. The International Economic Context of This Dispute[1]

A large part of the world's commercial shipping — and of shipping that serves the United States — is carried on by so-called flag of convenience ("FOC") vessels manned by Asian crews. Of the third world countries that supply FOC crews perhaps the Republic of the Philippines is the most dependent economically on the jobs these vessels provide. The Philippines closely regulates Filipino employment on FOC vessels through the POEA, the Philippine Overseas Employment Administration. Under POEA regulations, all FOC crews must be obtained through licensed Filipino manning agents, all employment contracts for each job must be submitted for POEA approval and all disputes arising between vessel and seaman must be submitted to arbitration in the Philippines. ER 236, 237, 276, 281, 285-287, 294, 297, 299-300, 304.

The International Transport Workers Federation ("ITF") is an international labor secretariat headquartered in London. Although it has affiliates in other parts of the world, including Asia, it primarily represents Western European seamen. Many of those seamen's jobs were lost when FOC ships, claiming that western wages were far too high for them to survive, looked to the third world for their crews. *See,* Chapman, *Trouble on Board,* 84 (ILR Press, Ithaca, 1992). In candid testimony in this case, the head of the ITF's Special Seafarers Section admitted that he is in charge of a campaign to destroy flag of convenience shipping. ER 427-430. As part of this campaign, the ITF attempts to force FOC vessels to pay a worldwide standard wage comparable to the average wage

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1. The following statement enlarges upon the Statement of Facts in the opinion of the Court of Appeals, which in most essential respects correctly reflects the record at trial. Some additional facts are supported by references to the Excerpts of Record ("ER") or to the Trial Transcript ("Tr"). The facts have been simplified for purposes of the issue raised by this cross-petition.

paid to the seamen of industrialized nations. The mechanism of enforcement is the secondary boycott — the use of affiliated longshoremen and pilots unions to disrupt the *operations of these* vessels at ports in which these unions are powerful. ER 431-432; *see generally,* Northrup and Rowan, *The International Transport Workers Federation and Flag of Convenience Shipping,* 31-111 (Univ. Penn., Phil. 1983).

This worldwide wage is far higher than the wage demanded by Filipino and other Asian seamen, and if it were accepted by FOC vessels, the incentive for using third world seamen would largely disappear. Thus, the ITF campaign threatened the seamen and economies of the Asian countries who supplied most of the crews to FOC vessels, as well as the owners of those vessels. Chapman, *supra,* p. 87 ("The mandate from the most influential affiliates [of the ITF] was to protect Western jobs.").

In the 1970s, manning agents in the Philippines and other Asian countries responded to the ITF threat. They acted to create the impression that the crews they supplied were receiving ITF wages when they were in fact receiving the manning agents' government-approved company wage. The manning agents recruited seamen who were willing to accept their regular wages — plus a bonus — while signing receipts and shipping articles reflecting payment of the ITF wage. These seamen also promised to tell ITF "inspectors" that they were receiving the ITF wage. Many FOC ship operators cooperated with this strategy.

By the end of the 1980s, the ITF Program — or double bookkeeping as it was sometimes called — was a widespread, accepted practice throughout Asia, as even plaintiffs' counsel conceded below. Tr. 370. Since 1989, there have been several lawsuits around the country — at least four in the Ninth Circuit and two in the Fifth Circuit brought by Mr. Dodson — on behalf of Asian seafarers who had originally agreed to participate in the practice.

C. The Events Out of Which This Action Arose

In March, 1989, a Filipino manning agent supplied a crew of nineteen seafarers to the PINE FOREST. All but one of its members had sailed on vessels following the ITF double bookkeeping program in the past. Many had sailed on several such ships. At the time they were recruited, they agreed that they would be paid their regular company wage, but would tell ITF inspectors, if they were encountered, that they were receiving the ITF wage. Tr. 227, 228, 240, 241; ER 459-461, 481, 497-498, 510, 568-569, 592-593, 597-598, 627, 630, 633, 645, 647, 669. Prior to joining the ship in Japan, the crew signed POEA standard form individual employment contracts providing for a one year term aboard the PINE FOREST and payment at the company wage. Those seamen who testified on the subject admitted that their jobs were highly desirable and that their regular wage was very attractive by Philippine standards. Tr. 192, 223, 241; ER 482, 497, 545, 551, 611, 626; *see*, Chapman, *supra*, p. 117.

The crew sailed aboard the PINE FOREST from the end of March 1989, when it signed the shipping articles, until late January 1990, signing receipts each month both for their actual wage and the ITF wage. Then, one of its members, Nelson Raby, encountered Louisiana attorney Richard J. Dodson, who told him that he had a legal right to the wages written into the shipping articles. ER 546-547. Raby then brought Mr. Dodson and an associate on board the vessel with a complaint and eleven of the nineteen Filipino crewmembers signed it. The seamen admitted that they had never raised any objection to the wage they had been receiving until that time.

The plaintiffs relied throughout the proceedings on the shipping articles as the source of their rights. But in bringing their action they disregarded the articles' provisions requiring them to first take any grievance they might have to the Master for informal

resolution. Tr. Exh. 1. They also did not comply with Philippine regulations that they follow a set grievance procedure under the exclusive jurisdiction of the Philippine government.

REASONS FOR GRANTING THE WRIT

The district court awarded $410,043 in attorneys' fees and $86,471 in attorneys' disbursements based upon this Court's opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). The Ninth Circuit affirmed the fee award on the same grounds. *Vaughan v. Atkinson* is often cited as an "equitable exception" to the American Rule against fee shifting or for the broader proposition that the federal courts have inherent equitable authority to award attorneys' fees for "bad faith." *See, e.g, F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 n. 17 (1974). But this Court has made it clear that the district courts have no equitable power to award attorneys' fees in the context of a statutory cause of action when Congress has failed to include attorneys' fees as a statutory remedy. *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967). The Seaman's Wage Act does not provide for attorneys' fees. The Ninth Circuit's affirmance of fees for plaintiffs' recovery under the Seaman's Wage Act is directly contrary to *Fleischmann v. Maier* and cases that follow it. This conflict demands correction.

Another reason for review is to answer the troubling question whether the district court may award attorneys' fees for what can only be characterized as bad faith breach of contract. This Court appeared to leave this unanswered in *Chambers v. Nasco*, ___U.S. ___ 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Defendants submit that the district court lacks inherent power to sanction bad faith prelitigation conduct by awarding substantial attorneys' fees. This is an unrelated and important question of federal law that should be settled by this Court.

Finally, the Ninth Circuit's affirmance of the entire attorneys' fees award after it reversed all of the $32.6 million judgment

offends this Court's decision in *Hensley v. Ekerhart*, 461 U.S. 424 (1983). Plaintiffs were immediately paid $267,586, the amount of wages the plaintiffs claimed were due them. Attorney time and expense were then focused on the assorted tort claims and the claim for penalties. Every theory advanced to support the $32.6 million judgment was rejected by the Ninth Circuit, yet all of the attorneys' fees originally awarded to these plaintiffs were affirmed on appeal. Even if this Court would affirm an award of attorneys' fees in this case, defendants submit that the amount of the fees is not reasonable. This is yet another independent reason for granting review.

The issues raised by defendants' Cross-Petition are not limited to this case. The Second Circuit has also held that *Vaughan v. Atkinson* provides a right to attorneys' fees in a Seaman's Wage Act claim. *Lewis v. Texaco*, 527 F.2d 921 (2d Cir. 1975), *on remand*, 418 F. Supp. 27 (S.D.N.Y. 1976). The District Court for the District of Oregon awarded $637,410 in attorneys' fees and disbursements in the related case, *Jose v. M/V Fir Grove*.[2] The substantial fee awards in these cases dwarf the results obtained and no doubt encourage like suits. Defendants submit that it is a policy decision for Congress whether to encourage Seaman's Wage Act litigation by awarding attorneys' fees in addition to the penalty provisions now part of the Act.

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2. The judgment in the *Fir Grove* case allows plaintiffs to retain $349,739, the total amount tendered to them shortly after the complaint and amended complaint were filed, and $16,233 in additional wages and interest. Plaintiffs have appealed from the judgment on the merits. Ninth Circuit No. 92-35610. Defendants have cross appealed from the attorney fee award. Ninth Circuit No. 92-36537; 92-36667; 92-36846. The Ninth Circuit will likely follow its decision affirming the fee award in this case unless there is an intervening and controlling decision from this Court. *See, e.g., United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985) (three judge panel may re-examine Ninth Circuit precedent when an intervening Supreme Court decision undermines that precedent).

A. The Grant of Attorneys' Fees Under *Vaughan v. Atkinson* Is Contrary to Supreme Court Precedent.

Vaughan v. Atkinson was an action for maintenance and cure. The employer's duty to provide an injured or ill seaman with maintenance and cure is an ancient remedy recognized and enforced by federal common law. The duty arises by virtue of the employment relationship and cannot be abrogated by contract. *Cortes v. Baltimore Insular Line,* 287 U.S. 367 (1932). Negligent or unreasonable failure to pay maintenance and cure is an independent tort that entitles the seaman to compensatory damages for aggravation of the injury. *Id.*

The award of attorneys' fees in *Vaughan* was cast as compensatory damages, but the standard resembled that appropriate for exemplary damages, an inconsistency pointed out by Justice Stewart in his dissenting opinion. 369 U.S. 527 at 539-40. What is clear is that attorneys' fees in *Vaughan* were awarded as an additional remedy in tort for breach of a common law duty. In the context of a statutory claim, however, this Court has expressly declined to award fees under *Vaughan. Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967).

Fleischmann was a trademark infringement case brought under the Lanham Act, 15 U.S.C. § § 1051-1127. The question was whether the court could award attorneys' fees for deliberate infringement in light of the fact that the Act's specified remedies did not include attorneys' fees. The Supreme Court described the limited exceptions to the American Rule prohibiting fees in the absence of statute or contract, including the exception created in *Vaughan v. Atkinson*: "In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed)." *Id.* at 718, *citing, Vaughan v. Atkinson*, 369 U.S. 527 (1962). The Court then noted that the "recognized exceptions to the general rule were

not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies." *Id.* at 719. The Court concluded that because Congress had not included attorneys' fees in the Lanham Act, it would be inappropriate to judicially create a compensatory remedy in addition to the remedies available under the statute. *See also, Smith v. Robinson*, 468 U.S. 992 (1984) (petitioner not entitled to attorneys' fees when claim was one to enforce the provisions of the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, a comprehensive remedial statute that does not provide for attorneys' fees); *Summit Valley Industries v. Carpenters*, 456 U.S. 717 (1982) (attorneys' fees not available to prevailing party under § 303(b) of the Labor Management Relations Act); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) (error to award fees under the Miller Act, 40 U.S.C. § 270, *et seq.*, when the Act does not include them).

Plaintiffs may argue that *Fleischmann* does not apply because courts have greater equity powers in admiralty, as well as particular solicitude for seamen. But this Court has recently made clear that once remedies have been established by Congress, even the court in admiralty is no longer free to act. *See, Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990). In *Miles*, the Court declined to allow non-pecuniary damages in a general maritime wrongful death claim or loss of future income in a survival action because the Jones Act did not include such damages. The Court noted the traditional solicitude for seamen, but then held:

> We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions

> that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Here, plaintiffs' claim was for wages and penalties under the Seaman's Wage Act. Although of hoary origin, the Act was recodified and updated by Congress in 1983. The penalty provision, 46 U.S.C. § 10313(g), provides for payment of two days wages for each day that wages are withheld without sufficient cause. This is the same double wage penalty found in the statute prior to reenactment and explained in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). This Court concluded in *Griffin* that the purpose of the statute is to secure prompt payment of seamen's wages and that "Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment." *Id.* The statute does not have any provision for attorneys' fees, and it never has.

If Congress had intended that attorneys' fees should be recoverable in wage dispute cases, it could have included a fee provision in the wage statute, just as it has in myriad civil rights statutes. Congress instead reenacted the penalty provision to insure that seamen were promptly paid. The effectiveness of the wage penalty is demonstrated by the fact that the defendants paid plaintiffs' various wage claims totaling $267,586 promptly upon demand and within days of the institution of suit.

The district court apparently felt that it could award fees under the general maritime law despite the absence of an express attorneys' fees provision in the Seaman's Wage Act. The court was wrong. Section 10313 is a comprehensive regulation of the remedies available under a seaman's contract for wages. Congress chose the double wage penalty as the remedy for unreasonable refusals to pay wages due under the Act. *Griffin, supra.* "[W]hen legislation expressly provides a particular remedy or remedies,

courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passengers Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974). The court was not free to supplement statutory remedies afforded by the Wage Act under general maritime law. *Fleischmann, supra, Miles, supra.*

B. Did the District Court Have Inherent Authority to Punish What It May Have Considered to Be Bad Faith Breach of Contract?

The district court's findings and conclusions state: "Plaintiffs as the prevailing party herein shall be awarded reasonable attorneys' fees in an amount to be determined at a later date. Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson.*" Pet. App. at 50. The Ninth Circuit did not discuss the finding of bad faith as such, but it did affirm the finding that the defendants were liable for the amount of wages stated in the ship's articles and not the much lower rate of the individual employment contracts:

> In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

Su v. Southern Aster, 978 F.2d 462, at 468. Pet. App. at A10. The Ninth Circuit essentially affirmed an award of attorneys' fees for breach of contract.

The sweeping language of *Vaughan v. Atkinson* implies that fees may be awarded any time a party is "forced to hire a lawyer and go to court to get what was plainly owed him." But such a reading of the "bad faith exception" to the American Rule would

swallow a large part of the rule. Defendants submit that *Vaughan* does no more than create an additional tort remedy for breach of a common law duty to pay maintenance and cure. The Ninth Circuit's reliance upon *Vaughan* in this case creates a tort remedy for willful or bad faith breach of contract in the context of a statutory claim. But do the courts really have inherent power to punish a willful breach of contract by fee shifting?

This Court recently grappled with the limits of inherent power to shift fees for bad faith. In *Chambers v. Nasco*, the Court affirmed an award of attorneys' fees based upon bad faith acts committed during the course of litigation. The majority noted that it expressed no opinion as to whether the district court would have had the inherent power to sanction the defendant for the underlying breach of contract. *Id.*, __ U.S. __ 115 L. Ed. 2d at 51, n. 16.

Justice Kennedy for the dissenters argued that the majority had mischaracterized the conduct for which the defendant was sanctioned and urged that the courts do not have the inherent authority to punish bad faith breach of contract:

> Despite the Court's equivocation on the subject, it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation conduct. A Court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for violation of a legal norm, here the binding obligation of a legal contract, is a matter of substantive law.
>
> The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad faith exception permits fee shifting as a

> sanction to the extent necessary to protect the judicial process. The Rule protects each person's right to go to federal court to define and vindicate substantive rights. . . . When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

___U.S. ___, 115 L. Ed. 2d at 64 (citations omitted).

The question whether the courts have inherent power to punish bad faith breach of contract may not have been squarely presented in *Chambers v. Nasco*, but it is here. Defendants submit that the district court lacked the authority to impose fees for what it considered to be prelitigation bad faith. The Ninth Circuit compounded the error when it affirmed. This Court should grant certiorari and decide the issue.

C. The Ninth Circuit Was Obligated to Recalculate or Remand for Recalculation the Attorneys' Fees Awarded After It Reversed the Judgment for $32.6 Million.

If this Court agrees that attorneys' fees are recoverable in a wage claim under the Seaman's Wage Act, it should consider whether the fee awarded is reasonable, given plaintiffs' limited success following appeal. *Hensley v. Ekerhart*, 461 U.S. 424 (1983). Defendants immediately tendered the amount of the wage claim. This was to avoid the two day wage penalty which this Court has held continues to accrue if any amount of the wages due is withheld without sufficient cause. *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982). In *Griffin*, the shipowner's delay in payment of $412 until judgment resulted in penalties of over $300,000. The

Griffin decision gives any shipowner a strong incentive to pay the demand and reserve the right to litigate whether the amount claimed was actually due. At trial, defendants contended that the individual employment contracts signed by the plaintiffs in Manila set the wage rate, while plaintiffs argued that the ITF wage rates stated in the articles controlled. The district court found the articles to be the contract of employment and the Ninth Circuit affirmed. The Ninth Circuit thus held the payment of $267,586 made in February 1990 to have been required under the Act. This was the sole issue upon which plaintiffs prevailed. The Ninth Circuit reversed the judgment for tort damages for "blacklisting," intentional infliction of emotional distress or "outrage" and fraud. The Ninth Circuit also reversed the $17 million in punitive damages and the $6.8 million in statutory penalties.

Despite the reversal of the $32.6 million judgment, over $25 million of which were for these plaintiffs, the Ninth Circuit affirmed the award of counsel fees, expenses and disbursements in total. Thus, the defendants are required to pay plaintiffs' attorney $410,043 in fees, and $86,471 in attorneys' disbursements for a "victory" that was won just days after the institution of suit. Plaintiffs may argue that the defendants' counterclaim required them to litigate their right to retain the funds tendered. But the wages were paid and disbursed over three years ago to thirteen individuals residing in the Philippines and were never "recoverable" as such, even if defendants prevailed on their counterclaim. Irrespective of this practical reality, the Ninth Circuit's affirmance of the fees and expenses does not take into account the time and money expended on losing issues. The extent of plaintiffs' success is a "crucial factor" in determining a reasonable fee. *Hensley, supra*. The Ninth Circuit was required to consider the limited success following appeal before it affirmed the fee award or to remand the matter to the district court to reset the fee.

The Ninth Circuit's affirmance of the fee award directly contradicts *Hensley v. Ekerhart* and unjustifiably rewards the plaintiffs' counsel for expending judicial resources on claims that were deemed without merit on appeal.

CONCLUSION

The "bad faith" exception to the American Rule against fee shifting created by *Vaughan v. Atkinson* is often repeated but rarely explained. Certainly it cannot mean that litigants are entitled to an award of attorneys' fees simply because they were "forced to hire a lawyer and go to court" to obtain relief for breach of contract. No matter how broadly *Vaughan* may be applied in common law actions, it has no place in a statutory claim. Congress has set the remedy for failure to pay wages without sufficient cause. The district court had no inherent authority to supplement the statutory remedy by awarding attorneys' fees. The Ninth Circuit decision is contrary to Supreme Court precedent respecting these important issues of federal law. Defendants respectfully request that this Court grant their Cross-Petition for Certiorari and decide the issues raised.

Dated: March 9, 1993

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Supreme Court, U.S.
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No. 92-1521

In The

Supreme Court of the United States

October Term, 1992

M/V PINE FOREST, *et al.*,

Cross-Petitioners,

v.

NELSON R. RABY, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents disagree with the Questions Presented by Cross-Petitioners, M/V Pine Forest, Delica Shipping, S.A., and Inui Steamship Co., Ltd. The Questions Presented by Cross-Petitioners state that the attorney's fees awarded to plaintiffs were pursuant to the Seaman's Wage Act, 46 U.S.C. § 10313. This is incorrect. Both the district court and the United States Court of Appeals for the Ninth Circuit made the award of attorney's fees and costs as an adjunct to plaintiffs' claims for wages under the General Maritime Law. Neither the district court nor court of appeals made the award of attorney's fees pursuant to 46 U.S.C. § 10313.

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STATEMENT OF THE CASE

A. Proceedings Below.

Respondents disagree with Cross-Petitioners' statements contained therein. The initial complaint sought wages under the General Maritime Law, statutory penalties pursuant to 46 U.S.C. § 10313, and additional tort damages under the General Maritime Law, including attorney's fees and costs.

The defendants state that, " . . . The Ninth Circuit ruled that although the individual plaintiffs had lost on every theory and claim propounded at trial, they were the prevailing parties because they had recovered $267,585 as a result of their suit and they were entitled to that amount under § 10313." Cross-Petitioners are incorrect that " . . . the individual plaintiffs had lost on every theory and claim propounded at trial, . . . ". Plaintiffs sued for their wages and were successful in obtaining $267,585 after the suit was filed. The Cross-Petitioners counterclaimed for a return of these wages, and plaintiffs successfully defended the counterclaim throughout the entire trial. Plaintiffs were successful on their general maritime tort claims for blacklisting on the trial court level which were reversed by the Court of Appeals for the Ninth Circuit, for which they have filed a petition for certiorari with this Court. Cross-Petitioners are incorrect that the trial court ruled that plaintiffs were entitled to their wages, " . . . under § 10313." Neither the trial court nor the Ninth Circuit predicated the award of attorney's fees on 46 U.S.C. § 10313.

B. The International Economic Context of this Dispute.

Respondents disagree with Cross-Petitioners' statements as being both incomplete and, in some instances, completely inaccurate. Cross-Petitioners fail to inform the Court that the Philippine Overseas Employment Administration's primary function is to find shipowners that will hire Filipinos and that the POEA does not protect the rights of seafarers, and that the recruiting industry in the Philippines is fraught with corruption. See Chapman, *Trouble on Board*, 23-29 (ILR Press, Ithaca, 1992). Cross-Petitioners are wrong that the practice of "double bookkeeping" was started by manning agents in the Philippines and other Asian countries in response to "the ITF threat". Double bookkeeping was started by shipowners solely for economic gain in an attempt to gain an unfair competitive advantage over their competitors. Many charter party agreements require that the vessel be enrolled with the International Transport Workers' Federation. Shipowners, in enrolling their ships, agree to pay certain wages and benefits. Shipowners devised the double bookkeeping scheme to be able to comply with their charter party agreements, but nevertheless pay substantially lower salaries than called for in the union contracts in order to maximize their profits. These shipowners find willing allies among the manning agents of the Philippines with the assistance of the Philippine Government that is dependent upon the hard currency these seafarers send home – 80% of their wages which must be paid in U.S. currency to their "allottees" in the Philippines.

Cross-Petitioners did not devise their defense of "the union is evil and made me do it" until subsequent litigation involving a sister ship, the M/V Fir Grove. In the instant litigation involving the M/V Pine Forest, the Cross-Petitioners' defense was solely that the seafarers had agreed to accept the lower wages and therefore they were not bound by the shipping articles. In the subsequent litigation involving the M/V Fir Grove, *Jose v. M/V Fir Grove*, 801 F.Supp. 358 (D.Or. 1992), the Cross-Petitioners coupled this defense with the alleged justification of union interference. The trial court found this argument unpersuasive and that defendants were "motivated solely by economic concerns." See *Jose v. M/V Fir Grove, supra* at 377.

Cross-Petitioners mischaracterize the economic context of the dispute in an attempt to morally justify their conduct which the district court described as follows:

> "The conduct of defendants in the practice of double bookkeeping and in its refusal to pay plaintiffs their rightful wages was fraudulent, intentional, and in bad faith. The seamen were in a very vulnerable position and were easily intimidated." (App. p. 38)
>
> * * *
>
> This court finds that the conduct by defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce and punish the plaintiffs. That such conduct was in complete disregard of the plaintiffs' rights. That defendants' conduct at all times relevant

herein, violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law of the United States to the protection of the courts." (App. p. 41).

CROSS-PETITIONERS' WRIT SHOULD NOT BE GRANTED

Respondents submit that Cross-Petitioners' Writ should not be granted because it does not fit within the criteria of Rule 10 of the Rules of the Supreme Court. The decision of the Court of Appeals for the Ninth Circuit was in strict compliance with the authority and guidelines this Court laid down in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). There are no decisions by any court of appeals in conflict.

The opinions of both the trial court and the court of appeals are clear that the award of attorney's fees was made under the General Maritime Law and the authority of *Vaughan v. Atkinson, supra*, and not under the Seaman's Wage Act, 46 U.S.C. § 10313. The Court of Appeals for the Ninth Circuit held the same as the trial court in this regard, stating:

> "Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to 'go to court to get what was plainly owed him'. *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962)."

In *Jose v. M/V Fir Grove, supra,* litigation involving Filipino seamen against a sister vessel of the M/V Pine Forest (with the identical defendants), the trial court awarded attorney's fees and costs in an order dated August 11, 1992. The trial court noted the defendants objected to any award of fees and costs because they were not allowed under the penalty wage statute.

> "Defendants' first objection is that plaintiffs are not entitled to recover fees at all since there is nothing in the penalty wage statute which authorizes such an award. I note that defendants did not raise this objection to plaintiffs' prayer for fees and costs at trial. However, defendants misconstrue my award which was based upon the equitable principles expressed in the Supreme Court's decision in *Vaughan* and not upon the U.S. Shipping Act which formed only part of plaintiffs' wage claim. As noted in my prior opinions in this case, I could retain jurisdiction over plaintiffs' claims for past due wages on the basis of general maritime law, even in the absence of the U.S. Shipping Act."

Cross-Petitioners are deliberately attempting to misconstrue the basis of the attorney's fee award in this instant litigation just as they did in *Jose v. M/V Fir Grove, supra.* Plaintiffs' claims for wages were made under the General Maritime Law as were the claims for attorney's fees and costs.

It is a matter of hornbook law that the obligation to pay wages, just as the obligation to pay maintenance and cure, arises out of the contract of employment, the shipping articles. See Norris, *The Law of Seamen* (4th ed. 1985) § 6:1, "The Employment Contract":

> " . . . The master acts as the agent of the owner, but in accordance with the *general maritime law*, the seaman has a three-fold remedy for his wages, i.e., an action in personam against the master and against the owner, an action in rem against the vessel. The services of seamen are largely of a contractual nature.
>
> * * *
>
> But, even independent of statutes, shipping articles were required to be in writing under the *general maritime law*." (Emphasis added.)

This rule of the General Maritime Law has been codified internationally by ILO Convention No. 22, "Seamen's Articles of Agreement", which requires shipping articles as a matter of international law.

Plaintiffs' cause of action for their wages, and additionally the cause of action under the Seaman's Wage Act for penalties are entirely separate. The joinder of a General Maritime Law claim with a statutory claim does not emasculate the General Maritime Law claim as contended by the defendants. Defendants' strained interpretation of the law would mean that any time a seaman brings a maintenance and cure claim joined with a Jones Act claim, the seaman would not be entitled to any maintenance and cure, much less attorney's fees for the shipowner's failure to pay maintenance and cure, solely because of the existence of the Jones Act that allows recovery for personal injuries. Such is not the law.

Although the Seaman's Wage Act requires the payment of wages, within a certain time frame and under certain conditions, this in no way abrogates the obligation under the General Maritime Law that the shipowner pay

the seaman his wages. The distinctions between the obligation to pay under the General Maritime Law and the imposition of penalties under the Seaman's Wage Act were precisely set forth by the trial court in *Jose v. M/V Fir Grove* where it carefully noted the different legal standards involved in finding a breach of contract versus liability for double wages under the Seaman's Wage Act. See *Jose v. M/V Fir Grove, supra,* at p. 376.

Contrary to the assertions by the defendants, the court did not supplement the statutory remedies afforded by the Seaman's Wage Act. Instead, the court followed the well established General Maritime Law which affords a remedy for intentional, willful, persistent, callous, and bad faith conduct.

The breach of the duty under the shipping articles, whether to pay wages that are plainly due or to pay maintenance and cure, is akin to a tortious breach of contract. As explained by Justice Cardoza in *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 77 L.Ed. 371 (1932):

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."

In *Vaughan v. Atkinson, supra,* this Court did not affirm an award of counsel fees to allow cost or fee

shifting, but clearly affirmed the award as an item of *damages*:

"Our question concerns damages."

The general rule that attorney's fees are allowed as an element of *damages* under the court's equitable power is today a matter of hornbook law. As stated by Professor Tetley in *Maritime Liens and Claims* (1st Ed. 1985), at pp. 83-84:

"b) Equity

. . . In *Vaughan v. Atkinson* the Supreme Court proclaimed: 'Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief.' The Court noted that counsel fees have been awarded in equity actions in the past and added:

> 'As we stated in *Sprague v. Ticonic Bank*, 307 U.S. 161, 164, allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.'

Equity was applied in a negligence action by a stevedore company and a longshoreman against the vessel owner in *Bachtel v. Mammoth Bulk Carriers* [605 F.2d 438, 1980 A.M.C. 172 (9th Cir. 1979)]. Relying on the principle stated in *Vaughan v. Atkinson* and on the fact that the conflicts of interest between the longshoreman and the stevedore were eliminated by the 1972 amendments to the *Longshoremen's Compensation Act*, the Court held:

> 'Where the stevedore's pecuniary advantage was secured through the services of counsel

> employed by the longshoreman, the stevedore should be taxed with a proportionate share of the reasonable fee of the longshoreman's counsel.' "

Professor Tetley continues at page 84 and explains that there is an additional ground besides equity for awarding attorney's fees, namely, callous and unreasonable conduct:

> "c) Callous and unreasonable conduct
>
> Besides equity, another ground for awarding attorney's fees in admiralty arises when one party is callous and unreasonable in either taking or defending an action. The considerations are again equitable but here the fees are not awarded as costs but as *damages*, and usually in claims by seamen for wages and maintenance. The leading case is again *Vaughan v. Atkinson*:
>
> > 'In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court and get what was plainly owed him under laws that are centuries old. The default was wilful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure than this one.'
>
> While the dissenting judges held that counsel fees could not be recovered directly as damages, they nevertheless would have granted 'exemplary damages', if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of

> the seaman. In this way, indirect compensation for counsel fees could be made. The case was thus remanded back to the Eastern District Court of Virginia, where generous attorney's fees were awarded."

The failure to pay maintenance, wages and cure has always subjected the shipowner to *damages* in the form of attorney's fees, costs. Indeed, the recovery of attorney's fees and costs has always been expressly authorized by the General Maritime Law in admiralty cases where the defendants' conduct justifies such an award, even in cases that do not deal with maintenance and cure. See *The Apollon*, 6 L.Ed. 111, 115 (1824) (Story, J.).

In *Lewis v. Texaco*, 527 F.2d 921 (2d Cir. 1975), the Second Circuit determined that the reasoning in *Vaughan v. Atkinson, supra*, applied to actions for wage claims under 46 U.S.C. § 10313. On remand, the district court ruled that Texaco was recalcitrant, and had acted in bad faith by failing to pay the plaintiffs their wages. Accordingly, the court awarded attorney's fees to the plaintiffs. *Lewis v. Texaco*, 418 F.Supp. 27 (S.D.N.Y. 1976).

The cases cited by defendants simply are not applicable and deal with a variety of non-admiralty statutory claims, e.g. Trademark Infringement under The Lanham Act, 15 U.S.C. §§ 1051-1127, The Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*, and claims under The Miller Act, 40 U.S.C. § 270, *et seq.* Defendants are unable to point to a single case supporting their contention that *damages* in the form of attorney's fees and costs are not authorized in an admiralty case, because none exist.

Not one of the cases cited by defendants dealt with admiralty matters where the plaintiff enjoys the status as a "ward of the court". Plaintiffs, as wards of the admiralty courts, are entitled to the court's special protection. This special protection has always included the ability to award *damages* in the form of attorney's fees and costs for bad faith and intentional conduct, whether or not that conduct occurred prior to or during the course of the litigation. Indeed, in admiralty cases the award of *damages* in the form of attorney's fees and costs is predicated upon the fact that a defendant's prelitigation conduct "forced plaintiff to hire a lawyer and go to court to get what was plainly owed him." *Vaughan v. Atkinson, supra.*

The recent decision of *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991), does not support defendants' position for numerous reasons. First and most importantly, the Court in *Chambers* does not rely upon or discuss its decision in *Vaughan v. Atkinson*. This is so because the issues presented were completely distinct. *Vaughan* was an admiralty case where attorney's fees and costs are awarded as an item of damages and not for purposes of fee shifting or pursuant to some statutory authority. Secondly, the majority opinion confirms the inherent power of a court to assess attorney's fees as a sanction for a party's bad faith conduct in the course of litigation. Even the dissenting opinions of Justices Kennedy and Renquist acknowledged that sanctions were proper, but opined that the Court should utilize the sanctioning provisions authorized by F.R.C.P. Rule 11 and 28 U.S.C. § 1927 as the proper vehicle for the award. While the dissenting opinions criticize fee shifting for bad faith prelitigation conduct, the dissenters in no way suggest a

modification of the rule of *Vaughan* in an admiralty context.

The Court in *Chambers* was not concerned with the propriety of *damages* awards in the admiralty context. The defendants' attempt to 'bootstrap' the logic of *Chambers* into the realm of the admiralty is quite simply not supportable as a matter of law.

CONCLUSION

The Cross-Petitioners misstate the facts and the law. The cases they cite involving statutory fee awards are in no way related to awards under the General Maritime Law. Neither this Court nor any appellate court has ever suggested that this Court's decisions allowing attorney's fees in admiralty cases in *The Apollon, supra,* or *Vaughan v. Atkinson, supra,* were erroneous. The Ninth Circuit decision followed Supreme Court precedent and was correct in allowing attorney's fees for the shipowner's intentional bad faith conduct in forcing plaintiffs to go to court to obtain their wages and defend the shipowner's counterclaim.

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No. 92-1521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

M/V PINE FOREST, *et al.*,

Cross-Petitioners,

vs.

NELSON R. RABY, *et al.*,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF CROSS-PETITIONERS

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REPLY BRIEF OF CROSS-PETITIONERS FOR CERTIORARI[1]

I.

BECAUSE OF CONGRESS'S EXTENSIVE REGULATION OF THE SEAMAN'S CONTRACTUAL ACTION FOR WAGES, ATTORNEYS' FEES SHOULD NOT BE AWARDABLE IN SUCH ACTIONS IN THE ABSENCE OF LEGISLATION SO PROVIDING

The plaintiffs mischaracterize defendants' attack on the attorneys' fee award. Defendants do not argue that the fees were awarded pursuant to 46 U.S.C. §10313 and that they were therefore improper because that section does not provide for such fees. We fully acknowledge that the fees were awarded under asserted general maritime principles supposedly set down in *Vaughan v. Atkinson*, 399 U.S. 527 (1962). We also acknowledge that plaintiffs' claim for back wages stated a cause of action for breach of a maritime contract as well as for violation of subsection (f) of the Seaman's Wage Act. What we argue, however, is that in determining whether a particular remedy is available in an action for wages, one may not look only at traditional maritime contract principles, but must also look at and follow the explicit and implicit requirements of the Wage Act.

What is meant by the Seaman's Wage Act varies from context to context and speaker to speaker. For present

[1] Cross-petitioners will not generally address assertions of fact in the Brief in Opposition which they contest, since such factual issues need not be resolved to determine whether to grant certiorari. However, the Court should be aware that the only evidence at trial as to who devised the practice of double bookkeeping was from the manning agent in this case, Noimi Zabala, who testified that he, along with a manning agent in Tokyo, was its creator. Tr. 47; see also Tr. Ex. 8.

purposes, defendants will use the term to cover not only subsections (e) and (f), but the entirety of Section 10313 plus Sections 10314 and 10315. These are set out in the Appendix. The reason all of these provisions are referenced is that they all limit and control a seaman's wage remedy, irrespective of what his contract may say.

Thus, for example, Section 10313(a) determines when the employment of a seaman on a foreign vessel commences for purposes of calculating any wages due him, even if his contract stipulates a different date. Subsection (b) gives him a right to wages whether or not the vessel earns freight or if the vessel is lost, again, irrespective of the terms of his contract. Subsection (c) is especially interesting. It gives the seaman a right to one month's wages in addition to wages earned if his employment never begins or is terminated before he could have worked for one month. On the other hand, by necessary implication the subsection denies him additional damages, even if under traditional contract principles he has suffered them. He is not permitted to receive damages for any longer period of employment that he was promised, even though he cannot obtain substitute employment.

The remaining provisions of Section 10313 are of similar effect. They all impose terms of employment on the seaman, the vessel or both, irrespective of their contract. So, too, do Sections 10314 and 10315. Section 10314, for example, does not allow a seaman and a vessel to contract to pay the seaman any of his salary in advance of his earning it, even though this might in many circumstances be to the seaman's benefit – especially where he is covered by a collective bargaining contract and represented by a union.

Of course, there are important historical reasons for these statutory restrictions on the ability to contract and the remedies available for breach. But the critical point is that for whatever reasons, Congress decided to regulate the remedies for breach of a seaman's employment contract extensively. In so doing, it has given the seaman many benefits – e.g., the penalty for failing to promptly pay wages after termination of employment – and deprived him of others.

Plaintiffs now want the courts, even though none of the legislation dealing with the seaman's action for wages so provides, to grant the seaman an additional benefit – a benefit that amounts to an additional penalty for failing to promptly pay a wage claim. Surely, this is to invade an area in which Congress has substantially occupied the field and in which Congress should decide what additional regulation is required. In sum, although we agree that plaintiffs stated a claim for wages under a maritime contract, the substantial regulation of such contracts by Congress precludes the courts from granting an additional remedy for their breach without Congress's approval. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (general maritime remedies may not supplement Jones Act remedies); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (general maritime remedies may not supplement Death on the High Seas Act remedies). Accordingly, the Court of Appeals erred in awarding attorneys' fees.

II.
THE EXTENSION OF *VAUGHAN v. ATKINSON* TO WAGE CLAIMS CREATES A NEW EXCEPTION TO THE AMERICAN RULE AGAINST FEE SHIFTING THAT SHOULD BE ADDRESSED BY THIS COURT

Plaintiffs quote from the trial court findings that the defendants engaged in malicious and oppressive misconduct. By doing so, they hope to support the attorneys' fees award under *Vaughan*. The record, however, does not support the findings quoted. This is reflected in the Court of Appeals decision, which emphasizes the lack of record support for the mental distress, outrage, and fraud claims.

More importantly, *Vaughan* does not apply because this is not a maintenance and cure claim. If plaintiffs' characterization is accepted, it is a contract claim for breach of the shipping articles.[2] By extending *Vaughan* to a contract case, the Ninth Circuit did here exactly what Justice Kennedy in *Chambers v. Nasco* said the federal courts cannot do: It punished the defendants for breach of contract and forced them to litigate the terms of the contract at their peril. Yet the American Rule is meant to protect "each person's right to go to federal court to define and vindicate substantive rights." *Id.*, ___ U.S. ___ , 111 S.Ct. 2123, 115 L.Ed.2d 27, 64 (1991). That this case was pursued by seamen within

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[2] Defendants have not sought review of the Ninth Circuit's holding that the articles and not the individual employment contracts set the wage rates. The record establishes, however, that no party ever viewed the articles as the agreement. The defendants paid the plaintiffs the amount they had in fact been promised and to which they had in fact agreed in the individual employment contracts. In no ordinary sense, then, can it be said that defendants acted in bad faith by failing to pay a wage that plaintiffs never expected to receive.

the admiralty jurisdiction of the court does not alter the American Rule against fee shifting. In *Miles v. Apex Marine Corp.*, a seaman's case also asserting statutory and general maritime law claims, this Court noted that the federal courts "are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." 498 U.S. 19 (1990).

Plaintiffs argue that this case does not fit Rule 10 guidelines because there is no conflict in the Circuit Courts on the issues raised. Defendants point out that if the judgment is viewed as punishment for prelitigation bad faith as plaintiffs contend, then several Circuit Courts that have considered the issue conflict with the Ninth Circuit's decision in this case. The Fifth, Sixth and Eleventh Circuits have all held that prelitigation bad faith does not support an award of attorneys' fees. *See Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989) (attorneys' fees not recoverable despite viciousness of the assault that formed the basis of the claim); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (en banc) (attorneys' fees premised on bad faith in the act underlying the substantive claim reversed as inconsistent with the American Rule); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004 (11th Cir. 1985) (to support attorneys' fees, the bad faith must be part of the litigation process itself). These cases are not maritime cases but they are applications of the American Rule against fee shifting.

This case presents a new exception to the American Rule. Extension of *Vaughan v. Atkinson* to wage claims is contrary to the remedies for breach of the shipping articles mandated by Congress in the Seaman's Wage Act. The award also violates the prohibition against fee shifting for prelitigation conduct recognized by at least

three other Circuit Courts of Appeal. This case presents an important question of federal law that should be settled by this Court.

CONCLUSION

The Cross-Petition should be granted so that the Court can decide whether the new exception to the American Rule recognized below should be upheld.

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Respectfully submitted,

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APPENDIX

46 U.S.C. §10313
Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

(1) unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense, unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. §10314
Advances

(a)(1) A person may not –

(A) pay a seaman wages in advance of the time when the seaman has earned the wages;

(B) pay advance wages of the seaman to another person; or

(C) make to another person an order, note, or other evidence of indebtedness of the wages, or pay another person, for the engagement of seamen when payment is deducted or to be deducted from the seaman's wage.

(2) A person violating this subsection is liable to the United States Government for a civil penalty of not more than $500. A payment made in violation of this subsection does not relieve the vessel or the master from the duty to pay all wages after they have been earned.

(b) A person demanding or receiving from a seaman or an individual seeking employment as a seaman, remuneration for providing the seaman or individual with employment, is liable to the Government for a civil penalty of not more than $500.

(c) This section applies to a foreign vessel when in waters of the United States. An owner, charterer, managing operator, agent, or master of a foreign vessel violating this section is liable to the Government for the same penalty as an owner, charterer, managing operator, agent, or master of a vessel of the United States for the same violation.

(d) The owner, charterer, managing operator, agent, or master of a vessel seeking clearance from a port of the

United States shall present the agreement required by section 10302 of this title at the office of clearance. Clearance may be granted to a vessel only if this section has been complied with.

(e) This section does not apply to a fishing or whaling vessel or a yacht.

46 U.S.C. §10315
Allotments

(a) Under prescribed regulations, a seaman may stipulate as follows in the agreement required by section 10302 of this title for an allotment of any part of the wages the seaman may earn:

(1) To the seaman's grandparents, parents, spouse, sister, brother, or children;

(2) to an agency designated by the Secretary of the Treasury to handle applications for United States savings bonds, to purchase bonds for the seaman; and

(3) for deposits to be made in an account for savings or investment opened by the seaman and maintained in the seaman's name at a savings bank or a savings institution in which the accounts are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(b) An allotment is valid only if made in writing and signed by and approved by a shipping commissioner. The shipping commissioner shall examine allotments and the parties to them to enforce compliance with the law. Stipulations for allotments made at the beginning of a voyage shall be included in the agreement and shall state the amounts and times of payment and the person to whom payments are to be made.

(c) Only an allotment complying with this section is lawful. A person falsely claiming qualification as an allottee under this section is liable to the United States Government for a civil penalty of not more than $500.

(d) The owner, charterer, managing operator, agent or master of a vessel seeking clearance from a port of the

United States shall present the agreement at the office of clearance. Clearance may be granted to a vessel only if this section has been complied with.

(e) This section applies to a foreign vessel when in waters of the United States. An owner, charterer, managing operator, agent, or master of a foreign vessel violating this section is liable to the Government for the same penalty as an owner, charterer, managing operator, agent, or master of a vessel of the United States for the same violation.